Filed 3/7/12 P. v. Thomas CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

TILISA THOMAS,

Defendant and Appellant.

F061620

(Super. Ct. No. BF130865A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Michael B. Lewis, Judge.

Richard J. Krech, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and Sean M. McCoy, Deputy Attorneys General, for Plaintiff and Respondent.

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After her motion to suppress was denied, appellant Tilisa Thomas entered a no contest plea to possession for sale of cocaine base. On appeal, Thomas contends the trial court erred by denying her suppression motion. She also argues that there no substantial

evidence to support the imposition of a drug program fee and raises a claim of ineffective assistance of counsel.

For reasons outlined below, we conclude that handcuffing Thomas and placing her in a patrol car did not transform the investigative detention into an illegal arrest and therefore the evidence subsequently discovered, including her statements, should not be suppressed. We also conclude that Thomas's other claims lack merit. We therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On October 27, 2009, around 10:15 p.m., Bakersfield Police Officer Nicole Shihrer saw a gold Ford Contour with no rear license plate or temporary registration sticker on the back.[1] She and her partner Officer Finney stopped the car and made contact with Thomas, who had been driving the car, and a single passenger. In response to Officer Finney's question, Thomas said she was on probation for drugs.

Officer Shihrer asked Thomas if she could search her person, and Thomas consented. She got out of the car and put her hands behind her head. The officer patted Thomas down and noticed that she seemed very nervous. Officer Shihrer described Thomas as "shaking and very jittery and her level of nervousness seemed kind of heightened for just a normal traffic stop."

When Officer Shihrer began patting down her rear waistband area, Thomas dropped her right hand and put it on her waistband. She also noticed that Thomas "was clenching her buttocks and she wasn't really spreading her legs very far," as was the normal practice when conducting a pat-down search. Thomas told the officer that she was trying to keep her pants from falling down, but Officer Shihrer noticed that her pants

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[1] The facts of the stop and investigation are taken from Officer Shihrer's testimony at the hearing on the suppression motion.

were not falling down, "they appeared to fit her just fine." No weapons or contraband were found during the pat-down. Officer Shihrer then briefly seated Thomas on the curb.

The area of the stop was described as "very high crime." Officer Shihrer had been involved in numerous narcotics-related investigations in the immediate area of the traffic stop. Based on her experience and training, she also knew that women often hide narcotics on their person in their bra or underwear. After confirming through a records search that Thomas was on probation for narcotics, Officer Shihrer intended to conduct a probation search of her car. However, she worried that if she left Thomas out on the curb while her car was being searched, Thomas might attempt to conceal or destroy any narcotics she might have hidden on her person. In addition, the passenger was already sitting on the curb, and Officer Shihrer did not want Thomas sitting next to another person. For these reasons, Officer Shihrer put Thomas in handcuffs, placed her in the rear seat of her patrol car and closed the door, while she initiated a probation search of Thomas's car. The officer did not intend to arrest Thomas at this point.

Within a few minutes, Officer Shihrer returned to her patrol car (presumably after initiating a search of Thomas's car) and opened the rear door. She described what followed:

> "[A]s soon as I opened [the door], Ms. Thomas asked me if she was going to jail, and I told her that she could. I wasn't completed with my investigation. I told her that if she was concealing something on her person, that she just needed to be honest because there was the potential chance that if we did find something in the car, found a reason to arrest her, that she may be -- and she did take narcotics into a jail, she could be looking at additional charges."

Thomas then told Officer Shirher she was concealing narcotics in her buttocks. Officer Shihrer asked if she could get it herself, and Thomas retrieved the drug (cocaine) and gave it to the officer.

In March 2010, the Kern County District Attorney filed a two-count information charging Thomas with (1) transportation or sale of cocaine in violation of Health and

Safety Code[2] section 11352, and (2) possession for sale of cocaine base in violation of section 11351.5.

In April 2010, Thomas filed a motion under Penal Code section 1538.5 to suppress all evidence -- including "physical items" and "oral statements made by the defendant" -- obtained as result of the alleged "illegal detention, arrest, and search" that occurred on October 27, 2009.[3] Thomas argued that handcuffing and placing her in a patrol car amounted to an arrest without probable cause and, therefore, the evidence acquired as a result of her unlawful seizure should be suppressed.

A hearing on the suppression motion was held on May 6, 2010. Officer Shihrer was the only witness. She testified that she handcuffed Thomas and placed her in her patrol car because of a concern that Thomas could attempt to conceal any narcotics further or discard them. After hearing argument, the court denied the motion. The court reasoned:

> "Clearly, the initial stop was okay. [Thomas] gave consent. Based on all the facts known to the officer, including the defendant's demeanor and the fact she was on probation for narcotics, I believe that the officer has articulated why she continued the detention. I don't think it was an arrest.
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> "I understand in some situations, ... handcuffing can be the arrest, but that's not the one and only factor we look at. But given the overall circumstances, I think there were grounds to continue the detention. And, therefore, then it was consent after that. She even asked her -- she pulled the narcotics out of her buttocks without even a further search. She did it on her own. Motion denied."

On November 2, 2010, Thomas pled no contest to count 2 with the understanding that she would be sentenced to no more than three years in state prison. Count 1 was

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[2] Subsequent statutory references are to the Health and Safety Code unless otherwise noted.

[3] The motion incorrectly identified the date of the search as October 26, 2009.

dismissed in exchange for the plea. On January 4, 2011, the court sentenced Thomas to three years in state prison and imposed various fees and fines.

DISCUSSION

Motion to Suppress

The Fourth Amendment to the federal Constitution and our state Constitution prohibit unreasonable seizures. (Cal. Const., art. I, § 13.) "'A seizure occurs whenever a police officer "by means of physical force or show of authority" restrains the liberty of a person to walk away.' [Citation.]" (*People v. Celis* (2004) 33 Cal.4th 667, 673 (*Celis*).) A seizure may be characterized as either a detention or an arrest. (*In re Antonio B.* (2008) 166 Cal.App.4th 435, 439-440.)

A detention allows the police to investigate whether a person's suspicious conduct is actually criminal. (*Celis, supra,* 33 Cal.4th at p. 674.) An investigative detention is permitted "when there is '"some objective manifestation" that criminal activity is afoot and that the person to be stopped is engaged in that activity.' [Citations.] … [S]uch a detention 'must be temporary and last no longer than is necessary to effectuate the purpose of the stop.' [Citations.]" (*Ibid.*) For example, a "brief stop and patdown of someone suspected of criminal activity is ... an investigative detention requiring no more than a reasonable suspicion." (*Ibid.*)

An arrest, on the other hand, must be supported by a warrant or probable cause. "Probable cause exists when the facts known the arresting officer would persuade someone of 'reasonable caution' that the person to be arrested has committed a crime." (*Celis, supra,* 33 Cal.4th at p. 673.)

In this case, Thomas contends that, while the consent search of her person was appropriate at its inception, it became an illegal de facto arrest when Officer Shihrer handcuffed her and placed her in the rear of the patrol car without probable cause. Because the arrest was illegal, Thomas's subsequent confession and production of the contraband should have been suppressed. The People dispute that Officer Shihrer's

conduct amounted to an arrest. They argue that the circumstances justified detaining Thomas to investigate, and when Thomas was handcuffed and sitting in the patrol car, she "was still merely the subject of an investigatory detention."

In reviewing a ruling on a motion to suppress evidence, "we defer to the trial court's express and implied factual findings that are supported by substantial evidence. We then independently apply constitutional principles to the trial court's factual findings to determine the legality of the search or seizure. [Citations.]" (*People v. Stier* (2008) 168 Cal.App.4th 21, 26 (*Stier*).)

It has long been recognized that an intended investigative detention may exceed the permissible intrusion needed to confirm or dispel reasonable suspicion and thus "become[] a de facto arrest requiring probable cause." (*In re Carlos M.* (1990) 220 Cal.App.3d 372, 384.) "The distinction between a detention and an arrest 'may in some instances create difficult line-drawing problems,'" however. (*Celis, supra,* 33 Cal.4th at p. 674.) The determination is highly fact-dependent and "'focus[es] on whether the police diligently pursued a means of investigation reasonably designed to dispel or confirm their suspicions quickly, using the least intrusive means reasonably available under the circumstances.'" (*Id.* at p. 675, quoting *In re Carlos M., supra,* 220 Cal.App.3d at pp. 384-385.)

Although "[h]andcuffing substantially increases the intrusiveness of a detention and is not part of a typical detention[,] … because a police officer may take reasonable precautions to ensure safe completion of the officer's investigation, handcuffing a suspect during a detention does not necessarily transform the detention into a de facto arrest. [Citations.]" (*Stier, supra,* 168 Cal.App.4th at p. 27.)

In *Celis, supra,* 33 Cal.4th 667, our Supreme Court found that handcuffing a suspect for a few minutes did not turn the investigative detention into an arrest. In that case, a police task force was investigating a state-wide drug trafficking ring, suspected of concealing and transporting drugs inside large truck tires. The investigation led to the

defendant, who was put under surveillance. He was seen driving to a tire store and picking up an air pressurized tank, then driving to the Mexican border and walking across the border. The next day he drove to the tire store again and left the store with a deflated tire. The same day, he and another man returned to the tire store with an air pressurized tank. They left the store and returned to his house with the tank. Later that day, an officer saw the defendant leave his house, rolling a tire toward the alley. About the same time, the man who had accompanied the defendant to the tire store arrived in the alley driving a truck. The officer pulled his gun and ordered the defendant and the man in the truck to stop. Officers handcuffed the defendant and had him sit outside his house. (*Id.* at p. 672.)

In *Celis*, the Supreme Court concluded that handcuffing the defendant and having him sit on the ground for a few minutes did not turn the investigative detention into an arrest. Under those circumstances, the court concluded that it was not unreasonable for the officer to draw his gun and handcuff the suspect briefly. (*Celis, supra*, 33 Cal.4th at p. 676.) The officer had reason to believe the defendant was concealing drugs or drug proceeds in the truck tire he was rolling, and the officer was faced with two suspects, each of whom might flee if the officer stopped one but not the other. (*Ibid.*)

In reaching its conclusion, the *Celis* court recognized the importance of the duration, scope, and purpose of the initial detention in determining whether police action is reasonably necessary to effectuate the purpose of the detention. (*Celis, supra*, 33 Cal.4th at pp. 675-676.) Of particular significance are the facts known to the officers at the time of the detention. (*Ibid.*)

"'[A]n investigatory detention exceed[s] constitutional bounds when extended beyond what is reasonably necessary under the circumstances which made its initiation permissible.'" (*People v. McGaughran* (1979) 25 Cal.3d 577, 586.) However, "[c]ircumstances which develop during a detention may provide reasonable suspicion to prolong the detention. [Citation.] There is no set time limit for a permissible

investigative stop; the question is whether the police diligently pursued a means of investigation reasonably designed to confirm or dispel their suspicions quickly. [Citations.]" (*People v. Russell* (2000) 81 Cal.App.4th 96, 101-102.)

Based on the facts of this case, the duration and scope of the investigative detention were not unreasonable to effectuate the purpose of the detention--to confirm or dispel Officer Shihrer's suspicion that Thomas possessed drugs. Thomas was pulled over because her car lacked a license plate or registration. During the stop, however, Officer Shihrer learned from Thomas that she was on probation for drugs and observed that she was unduly nervous. During the consensual search of her person, she did not spread her legs very far as requested and clenched her buttocks, explaining that her pants were falling down when, according to the officer's observation, they were not. Officer Shihrer was entitled to regard defendant's conduct as evasive and suspicious in light of the situation confronting her. Based on these facts, in addition to the stop occurring in a very high crime area, including narcotics-related activity, where Officer Shihrer had previously conducted numerous narcotics-related investigations, and her previous law enforcement training and experience, the officer reasonably suspected that Thomas was concealing narcotics on her person. Officer Shihrer then conducted a records search, confirmed Thomas was on probation for a narcotics conviction and initiated a probation search of the car. (Thomas does not contend that the search of the car was illegal.) Based on these facts and circumstances, the officer's continued detention of defendant by handcuffing and placing her in the patrol car, while she initiated a brief probation search of Thomas's car, was warranted and reasonable to assure that Thomas did not further conceal or destroy any drugs she may have possessed while the car search was completed.

We conclude, therefore, that Thomas was still the subject of an investigative detention, not a de facto arrest, at the time she admitted possessing, and produced, the narcotics. Consequently, the trial court did not err by denying Thomas's motion to suppress.

Imposition of fees

Thomas contends that there was no substantial evidence to support the trial court's imposition of a drug program fee. We disagree.

Under section 11372.7, subdivisions (a) and (b), a trial court is authorized to impose a $150 drug program fee if it determines the defendant has the ability to pay. The statute does not require the court to make express findings. (*People v. Staley* (1992) 10 Cal.App.4th 782, 785.) In the absence of evidence to the contrary, we assume the trial court in this case followed the law and, before imposing the drug program fee, made an implied finding that Thomas had the ability to pay. (Evid. Code, § 664).

"Ability to pay does not necessarily require existing employment or cash on hand." (*People v. Staley*, *supra*, 10 Cal.App.4th at p. 785.) The trial court was permitted to rely on Thomas's ability to find productive employment once her sentence is completed. (*Id.* at p. 786.) Further, Thomas did not object to the imposition of fees at sentencing. "If there were any ... impediments [to Thomas's ability to earn money], defendant would be in the best position to know of and develop that information. Since [she] failed to object to imposition of the drug program fee or to request a hearing on [her] ability to pay, we assume there are no such impediments." (*Ibid.*) Under these circumstances, we will not disturb the trial court's implied finding of ability of pay.

Ineffective assistance of counsel

Finally, Thomas argues that she received ineffective assistance because her counsel failed to raise a Fifth Amendment challenge. We agree with the People that this claim is not cognizable on appeal because Thomas has not obtained a certificate of probable cause.

Generally, an appeal from a judgment of conviction upon a plea of guilty or nolo contendere may not be taken without a certificate of probable cause. (Pen. Code,

§ 1237.5.) There are two types of issues that are excepted from the certificate requirement: "'(1) search and seizure issues for which an appeal is provided under [Penal Code] section 1538.5, subdivision (m); and (2) issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed. [Citations.]'" (*People v. Emery* (2006) 140 Cal.App.4th 560, 564.) A Fifth Amendment claim is not a search and seizure issue and therefore does not fall within either of these exceptions. As a result, an ineffective assistance of counsel claim based on the Fifth Amendment also does not fall within an exception and requires a certificate of probable cause. (*Cf. People v. Rios* (2011) 193 Cal.App.4th 584, 595, fn.7 [claim of ineffective assistance of counsel in the course of a motion brought under Penal Code section 1538.5 may be addressed on appeal without certificate of probable cause].) A claim of ineffective assistance of counsel may be made in a petition for habeas corpus. (*People v. Avena* (1996) 13 Cal.4th 394, 419.)

DISPOSTION

The judgment is affirmed.

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Franson, J.

WE CONCUR:

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Dawson, Acting P.J.

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Kane, J.